FOURTH SESSION

Saturday Morning, April 29, 1922, at 10.30 o'clock a.m.

The Society met at 10.30 o'clock A.M., with Hon. George Gray, a Vice-President and a member of the Executive Committee, presiding.

The CHAIRMAN. Gentlemen of the Society: I understand that the reports made by the subcommittees on the advancement of international law at the session last evening will be the subject of discussion this morning, and that subject is now before the Society. Action upon the report of Subcommittee No. 1 is now in order.

The CHAIRMAN. Is Dr. Hill present? (After a pause) Is any other member of the subcommittee present who would like to introduce the subject of that report?

Professor GEORGE GRAFTON WILSON. Mr. Chairman, I move that Dr. Judson speak for Subcommittee No. 2.

Dr. HARRY PRATT JUDSON. I do not know, Mr. President, what course the Society desires to take, but to bring it before the Society, I move the adoption of the report.

Baron S. A. KORFF. I second the motion.

Professor WILSON. May we have a summary of their conclusions before we vote upon them? I think we may not all be familiar with them.

Dr. JUDSON. The subject is the "Status of Government Vessels," and the recommendations are:

1. Government vessels are those which are owned or requisitioned by or chartered to a government. If a vessel is controlled and directed by a government and employed for public purposes, it is immaterial whether the interest of the government is that of ownership, or is based upon charter or requisition.

2. A government vessel operated by the government for public purposes is immune from foreign judicial process.

3. A government vessel operated by private persons for commercial purposes is not immune from foreign judicial process.

4. A government vessel operated by the government for commercial purposes is immune from foreign judicial process, but injuries committed by such vessel should render the government liable in its own courts.

5. Municipal law determines the liabilities of government vessels in domestic courts.

6. Every government should accord, both by executive action and judicial decision, at least as favorable treatment to the vessels owned or controlled by a friendly foreign government as it accords to those owned or controlled by it.

7. Some convenient method of proof of the governmental character of foreign vessels should be adopted by international agreement.

Those are the recommendations, Mr. Chairman.

Admiral RODGERS. I would like to ask, under what system a government vessel is presumed to run? There are two systems well known to the law of nations. One is the law of the respective countries applying to naval ships, and the other is the law applying to privately owned ships,—municipal law. We have now under the army transport system, and we had until a very short time ago under the naval transport and hospital system, vessels running under the orders and administrative rules of the Navy Department, which did not comply either with naval law or with municipal law. If the master exercised his full powers under the civil law and not in accord with the administrative orders of the War Department or of the Navy Department, he would meet with discharge, and that was sufficient to make good the government's orders, but it did not give the ships any standing in foreign ports. Then the question arises, what would happen if a liner owned by the government, run as a merchantman, enters a foreign neutral port during war. Where would she stand?

The CHAIRMAN. Owned and operated by the government?

Admiral RODGERS: As a liner, like the Shipping Board vessels.

Dr. JUDSON. With your permission, I will ask Mr. Kingsbury, Secretary of our Subcommittee, to answer.

Mr. HOWARD THAYER KINGSBURY. Mr. Chairman, the questions which Admiral Rodgers has just put, were really the basis of the study which this subcommittee undertook to make, and on which it undertook to frame these recommendations. There have grown up in the last few years, particularly since the beginning of the war, this new and somewhat indeterminate class of vessels which are partly government and partly private, and there has been much conflict in the decisions in this country and in England and on the Continent as to what their status would be and how far they were subject to the duties and liabilities of government ships, and how far they were regulated as private ships by municipal law; and it was the task of this subcommittee to try to formulate a body of very simple rules which might assist in reaching some decision on those points.

The lower courts of the United States have held, as was pointed out in the body of the report, that a vessel which was either owned or controlled by a government and which was operating in public service, whether or not a naval vessel, was entitled to the immunities of a government vessel, and could not be made subject to the process of a municipal court. That question has not yet been decided by the Supreme Court of the United States. I do not think it has been decided by the highest courts in England, and I understand that the decisions in the Continental countries are somewhat conflicting on the subject. So that the field is open for an attempt at formation of rules of international law on the subject. As I say, that was what this sub-

committee was striving to do. So I fear it is impossible to answer categorically Admiral Rodgers' questions, except to say that the present state of the law is uncertain. and therefore it is desirable to try to clarify it.

Admiral RODGERS. The hospital ships of the Navy gave great trouble at the outbreak of the war,—three of them were under my command. There was chaos on board, and they were not amenable to any law whatever on the high seas. It resulted in the Department at the beginning of the war removing from the hospital ships the merchant crews who declined to go to sea on them, and in substituting an entire naval crew, in order to have a recognized system of law instead of the administrative set of rules which is operative now under the War Department, and is neither military, naval nor municipal law.

Mr. EDWARD A. HARRIMAN. Mr. Chairman, I was not quite clear as to the last recommendation of the subcommittee in regard to the equal treatment of ships owned by foreign governments. I should like to know whether that is intended to prevent any discrimination by the United States in favor of its own vessels in its own ports and in the Panama Canal, for example. It is not clear to me.

Mr. KINGSBURY. The report did not undertake to deal with preferential treatment of domestic vessels in matters of that kind. The recommendation of the subcommittee was that in any immunities from judicial process which a nation undertook to afford to its own quasi-public ships, it should give at least as favorable treatment to the quasi-public ships of a foreign national. But that was simply in regard to immunity from judicial process, and not such discriminations as might apply to Panama Canal tolls or municipal regulations.

Professor PHILIP MARSHALL BROWN. I understood that the suit is to be brought in the courts of the home country of the flag of the ship. If that is so, I ask what would happen in the case of a collision in a foreign port between such a ship used for commercial purposes with another vessel. Do I understand that according to this recommendation suit could be brought *in rem?*

Dr. JUDSON. I will ask Mr. Kuhn of the subcommittee to answer.

Mr. ARTHUR K. KUHN. Mr. Chairman, in answer to the question it was not intended that the claimant should be relegated exclusively to the jurisdiction of the flag of the ship at all. It was only intended that governments that do not allow action for damages caused by some action of the vessel to be brought against the vessel by reason of government immunity should provide at least in their own jurisdiction some procedural remedy by which a claim could be presented and approved and compensation allowed. However, if the courts of the foreign country grant that remedy, then of course it is not necessary for the claimant to be relegated to the jurisdiction of the home country of the vessel. As a matter of fact, however, the body of the report shows by a review of the state of the law in this and other countries that there is no such remedy in a vast number of cases; and therefore we have

suggested that governments should allow a remedy at least in their own jurisdiction where no remedy is allowed in the foreign country.

Professor WILSON. Mr. Chairman, I would like, if I may, to have the report read again in regard to the status of public owned ships engaged in private business.

Dr. JUDSON. The thought of the subcommittee was that it would be very difficult to bring such a vessel under the judicial system or operation of a foreign country in which it might be; but, nevertheless, if there is a court of any kind, there ought to be a remedy, and we could not think of any other remedy but that in the courts of the country to which it belonged.

The CHAIRMAN. That would require Congressional legislation.

Dr. JUDSON. Probably; doubtless.

Professor WILSON. Then as I understand it, a government-owned vessel is exempted from judicial process if not engaged in commercial undertaking?

Dr. JUDSON. If operated by the government; that is to say, if government officers are in control of the ship.

Professor WILSON. Then in case of governments which are taking over practically all private property, they would be at an advantage in carrying on their business against a government where property is privately owned.

Dr. JUDSON. I suppose they would, if the government takes over these vessels and operates them.

Professor WILSON. I merely wish to inquire whether this Society would wish to give a preference to governments of that type over governments that are protecting the rights of property of their own private citizens.

Dr. JUDSON. The subcommittee believed in that case that there should not be such preference. It was unable to see how advantageously judicial processes would lie against naval officers, for instance, in command of such a ship, or any officer of the government. The situation is such as to render that difficult. There ought to be, however, by Congressional action in this country and similar action in other countries, a mode of providing for such matters, but we did not see how it could be done in the courts of foreign countries.

Mr. HARRIMAN. Mr. Chairman, it is difficult for me to see why, if the government goes into a private undertaking, the government and those concerned in carrying out that private undertaking should not be subject to the same laws as a private citizen would be under the same circumstances.

Professor ELLERY COREY STOWELL. I feel the same way that Professor Wilson does.

Mr. ARTHUR K. KUHN. Might I say in reply to that objection that the subcommittee considered that and thought it might be a desirable conclusion. At any rate, we are compelled to recognize the facts under which the government is operated in all countries, and it would be most objectionable to have government officers, officers of the Navy, or other employees,

arrested in foreign ports, for example, where they have not the facilities of private companies for defending themselves and taking other steps for the protection of the vessel, the crew, and the cargo; and it would be an interference with government function which I do not think the world is at the present time willing to undertake.

Professor MANLEY O. HUDSON. May I ask the gentleman a question? What is the difference in the facilities that the private firm has and those that the government has in a foreign port?

Mr. KUHN. As I understand it, in practical matters, private firms have permanent agents located in the ports with which they do business, and the government does not necessarily always operate lines permanently. They may operate a vessel for the purpose of carrying a cargo for an isolated voyage, as I understand it. I do not claim to be entirely informed on the subject. That is the fact with the United States Government. They have used their vessels for isolated voyages, for isolated purposes, without operating regular lines of traffic; and probably other governments do the same. And our government will continue to do her transportation of coal and other cargoes not in a regular line, and in that way I think there is an essential difference between the government and the private owner. At any event, quite apart from that, I do not think that the government should be interfered with by municipal courts in the operation of vessels upon which they have their own officials in command. That is the main principle, which, it seems to me, is the practical one.

Mr. CHARLES HENRY BUTLER. Mr. Chairman, the question which is now before the Society is, to my mind, a very important one. The question is, whether under this tendency of governmental requisition, if this immunity is granted from process to all vessels which in any way come under the control of the government, there will not be a great fleet of practically irresponsible engines of destruction going around on the ocean. The safety which I have to my maritime venture is that if a ship owned by anyone else, responsible or otherwise, rams into it and sinks it, I can at once get my remedy by taking process *in rem*. If simply because a government may be using that vessel, that vessel is immune from process when it goes into a foreign port, but not the home port of the vessel that has suffered damages, there is no redress absolutely unless it is taken up diplomatically. A little while ago a number of cases were pending in the courts of this country, and many are still pending, and it is of vast importance to maritime owners as to how this question will be decided. There was a batch of these cases in the Supreme Court of the United States, and after they had been held by that tribunal for various periods from three to eight months, they went off on some technical question, and the court ordered the rest of the cases back for reargument, so that the question was hung up there for something like two years. I think there were several cases there decided as to what extent this operation for purely commercial purposes should carry with it immunity,

as in the case of *The Exchange*, which is always quoted, where immunity was granted to the vessel of war of a friendly country, and which is an entirely different proposition. I hope that this Society will go very slowly in making any recommendation as to what is to be a policy which is to affect millions and millions of dollars of maritime property which is afloat. It seems to me it is a question too important to be disposed of at a single session and without any great consideration. The Supreme Court, I am told, found it very difficult to dispose of it, and it might present some difficulties to others.

The CHAIRMAN. If the Chair may be permitted to state what it conceives to be the question before the Society, it would be that the recommendation of the subcommittee only dealt with what it conceived to be the rule of international law in regard to certain government owned and operated vessels in a foreign port, in case of a collision or other claim for damages against them; and then as I understood the recommendation, the finding of the subcommittee was that such a vessel, as far as they could ascertain, was immune. But then they recommended that the justice of the case required that that immunity should be removed in those cases where private injury had been inflicted, which could only be done with the consent of the sovereignty. No sovereignty can be sued without its own consent, and therefore it rests with Congress, as Congress has frequently done on various occasions, to permit the government to be brought to trial.

Dr. JUDSON. That is exactly the idea of the subcommittee.

Mr. KINGSBURY. And if I might add just a word, Mr. Chairman, I think the recommendations of the subcommittee should be considered in the light of the further observations that were made at the close of the report, which perhaps some of the members here today did not hear last night. After the recommendations the committee said:

> The subcommittee recognizes that some of the foregoing proposed rules present certain controversial features. It may well be that if various governments undertake the operation of commercial shipping on an extensive scale, some of the immunities above suggested will prove too liberal, unless some method is adopted by international agreement for the convenient adjudication and collection of maritime claims arising out of the operations of foreign vessels, similar to that provided by the Act of Congress of March 9, 1920, in regard to claims against Shipping Board vessels.
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> The immunities which a government affords or denies to its own vessels in its own courts may also limit or affect the immunities which it may justly claim for them in a foreign jurisdiction.

What we undertook to do was to formulate what we believed to be the rules, as nearly as they can be ascertained, as now enforced, with these further observations as to possible further changes that future development may indicate to be desirable; that is, if the Society should approve and adopt the report of the subcommittee, it would be adopting a recommendation subject to these further observations.

Mr. CHARLES WARREN. May I ask the chairman of the subcommittee whether a "vessel requisitioned by the government," is synonymous with "operated by the government"?

Dr. JUDSON. No, not necessarily.

Mr. WARREN. The purpose of my question is this: during the war, at a time when I was in office, that was one of the serious questions of controversy, whether the form of requisition was a form of operation. For instance, one nation requisitioned ships, as I remember, simply to the extent of subjecting them to the orders of the Admiralty, but leaving the captain of the ship a private individual, paid by the private owners; and we raised a considerable question as to the status of that ship, and the whole question was: Was it or was it not being operated by the government? Therefore, it seems to me that without some definition of what operation by the government is, we leave the question still a controversial one.

Dr. JUDSON. The fifth clause of our report reads like this: "If a vessel is controlled and operated by a government and employed for public purposes, it is immaterial whether the interest of the government is that of ownership, or is based upon charter or requisition."

Mr. WARREN. But "operated for private purposes" is left undefined.

Dr. JUDSON. That is to say, controlled by the government for private purposes.

Mr. WARREN. Well, are "controlled" and "operated" synonymous?

Dr. JUDSON. Yes, essentially, in our minds.

Mr. WARREN. The reason I ask that is, that Mr. Kingsbury, I think, has been speaking of vessels commanded by a naval officer, and many of these will not be commanded by a naval officer.

Dr. JUDSON. If, however, the officers of the ship will be under the direction of the government, they will be under the orders of the government and the vessel will be operated by the government, if it be a governmental purpose. That is one thing; if for a commercial purpose, that is a different thing.

Mr. WARREN. It seems to me that the word "operated" is susceptible of different meanings.

Dr. JUDSON. Mr. Chairman, I am sufficiently old-fashioned to say that I should like to see the government keep its fingers out of private matters. That is only my private opinion, but governments are not following my opinions, I am sorry to say, in some of these things!

Admiral HARRY SHEPARD KNAPP. There is one feature in government ownership that I have not heard referred to, and it is very important. If government ownership of the United States, for instance, continues as it has started, and a war occurs between two other nations, and the United States is neutral, an important question may arise about the matter of visit and search. For instance, is a government operated vessel to be permitted to be visited and searched? And then the question comes of charter,—just how

far a charter may make a vessel liable as a public vessel. These things are very important, and the subject is a wide one that has not had adequate treatment. It is a very fortunate thing that this Society is taking it up. I merely mention that as another side of the question that has not had any attention, as I recall it, in the recommendation of the subcommittee.

The CHAIRMAN. It is an interesting phase. But does it not come somewhat within the purview of Subcommittee No. 1 in regard to the rights of visit and search?

Dr. JUDSON. It was for that reason, Mr. Chairman, that this subcommittee did not go into the question at all.

Mr. CHARLES G. FENWICK. Mr. Chairman, in view of the tentative character of the report, I should like to move its adoption.

Mr. FRANCIS W. AYMAR. I second the motion.

Professor WILSON. Mr. Chairman, it seems to me that the adoption of any report by this Society which we have not seen in print and which we have merely verbally heard, carries an endorsement beyond that which the Society ought to give. The receiving of the report is entirely a different proposition. To receive the report in order to have a chance to consider it, and subsequently adopt it, it seems to me, is the procedure we should take rather than adopting the report.

Mr. FENWICK. That is the sense in which I made use of the word "adopt." I would amend my motion to be that the report be accepted.

Mr. KUHN. Mr. Chairman, with the consent of the gentleman who has made the motion and spoken upon it, might I make an amendment that the report be received and referred to the Committee on Organization of Work? You will remember, sir, that a committee was appointed a year ago to coordinate the work of these four subcommittees, and the discussion that we have had on them this morning would seem to indicate that coördination was desirable and necessary. That will give an opportunity of having them printed and sent broadcast among the members of the Society, and read and considered, and the Committee on Coördination of the Work can then make recommendations for their final adoption in connection with the recommendations of the other committees.

Dr. JUDSON. I want to say, in seconding that motion, Mr. Chairman, that I heartily approve the suggestion of Mr. Wilson. There is no haste about these matters, as far as I can see. They are presented for the consideration of the Society; they should have the most mature consideration by every member of the Society throughout the country, and they should be handled by that Committee on Organization. They should be put in print and action should be deferred from year to year. There is plenty of time, when we all know exactly the bearing and are ready with amendments or suggestions. I second the motion in that spirit.

The CHAIRMAN. The reports of these subcommittees, if I may be permitted to say, now moved to be referred to the Committee on Organization

of Work, are steps or a step toward the larger objective of so-called codification. They are a statement of principles of international law.

I understand the motion to be to the report of Subcommittee No. 2, as well as the others when the time comes, to the Committee on Organization of Work.

The CHAIRMAN. Are you ready for the question, gentlemen?

The question was called for. The motion was duly put and unanimously carried.

Professor BROWN. Mr. Chairman, I would like to raise the question on the other reports. The time of the Society is limited. Would it not be desirable, if we are to discuss the other reports, to limit the time of discussion?

The CHAIRMAN. Yes, that is for the Society to decide. Is Subcommittee No. 1 ready to report?

Dr. DAVID JAYNE HILL. Mr. Chairman, the report was presented in full last night.

The CHAIRMAN. It is ready then for consideration this morning?

Dr. HILL. If it is desirable, I should suppose, sir, that the best method of consideration of a subject so complicated would be to permit these reports to be printed and circulated among the membership of the Society, in order to give very careful consideration, which is necessary to a subject of this character. I doubt very much whether any impromptu oral discussion, more or less detached, as it must necessarily be, will be very profitable. Your Subcommittee No. 1 has submitted its report. It is open to any observation that any member of the Society may choose to make. The members of the subcommittee are here to interpret, if necessary, the meaning of the report as presented, if called upon to do so.

The CHAIRMAN. As I understand it, the wish of the subcommittee as evidenced just now is that these reports, all of them, as this first one, be referred to the Committee on Organization of Work, and that they in the meantime be printed and circulated and be ready for intelligent discussion at the next meeting of the Society.

Mr. HOLLIS R. BAILEY. It seems to me worth inquiry whether the report of Subcommittee No. 2 is entirely in harmony with the report of Subcommittee No. 3 on the matter of conditional contraband. If conditional contraband is abolished, why the rules as to visit and search?

Mr. KINGSBURY. Would not that question come within the field of this Committee on Organization of Work? I therefore move that the same disposition be made of the report of Subcommittee No. 1 as has just been made of the report of Subcommittee No. 2.

Several members seconded the motion.

The CHAIRMAN. If any member of the Society wishes to exercise his right of discussion, he may do so.

Mr. WILLIAM H. BLYMYER. I should like to add a word to the report

on the submarine. I feel that the subject of its regulation has been neglected right along since its invention.

At the first Conference of The Hague, the subject was brought up, and Germany and England wished to abolish its use. The United States stood in the way. Our representative withdrew from the consideration of the question, and consequently the use of it was continued. At the second Conference of The Hague, no instructions were given to our delegates to establish rules with regard to its employment. Much more was at that time known as to its capabilities, and it should have been known that it would be a destructive instrument of warfare and that its use would not be confined strictly to operations against naval vessels. It seems to me, that it was then very clear that it would be used for the purpose of destroying commerce—vessels of commerce—and that fact had been emphasized time and again by writers on naval questions in England, especially in a number of articles that had appeared in *The Times*, for every treatise on maritime warfare declared that one of its objects was to destroy the commerce of the enemy. At the latter conference, abundant consideration was given to the destruction of neutral merchantmen, but the question of the destruction of enemy merchantmen was left entirely without mention in the rules which it formulated.

The conference which has just closed at Washington, it seems to me, has left the situation about as uncertain as it was after those preceding it. Under the Washington Treaties, or Resolutions, the general subject of the submarine is more confused than ever, through the introduction of two conflicting statements, the one under Article 4, in which it is declared that submarines are not permitted as commerce destroyers, and the other under Article 1, that they may destroy after the crew and passengers have been placed in safety. No state can know what its rights are and no jurist can advise it what it can legally do.

In my opinion, the question of the submarine can only be properly considered in connection with that of passenger traffic, that across the Atlantic, especially, where one class of vessels is used practically for passengers alone. Prior to the Civil War, there were no great passenger vessels. A passenger vessel is a development almost as recent as the submarine. The few vessels that left the Southern States during the Civil War were blockade runners, and people who went aboard them knew that they were doing so at great risk and upon their own responsibility. The idea of persons claiming a right as free citizens—as a part of their liberty—to take passage on a merchantman of a belligerent, and especially a belligerent merchantman carrying munitions of war to an enemy, is beyond all reason; and is a subject that might be considered by itself, at the coming conference, although the delegates will be prohibited, by the Second Washington Resolution, from further direct consideration of the use of the submarine and will probably consider themselves even prohibited from making further recommendations, for I

read in the *New York Times* this morning that the government is about to appoint delegates to this conference to consider the further rules of warfare, of maritime warfare, and that the subject of the submarine is not to be brought up, as it is supposed to be satisfactorily settled.

I wish, in relation to passengers, to call attention to several situations which have not been covered by the rules which have just been formulated:

A merchantman that is used by a belligerent for the sole purpose of transporting munitions, becomes, upon starting, a transport of munitions, a vessel of war, and is subject to destruction at sight by a submarine. I am sure that, under the rules and ideas generally prevailing, a passenger vessel, if so used, would also be so classed. What then is its status if passengers sail on that vessel? Does that fact, in itself, change it to a passenger vessel, and give it immunity from attack? If that is the case, there should be some stringent provision made so that the commanders of submarines may know at sight when a vessel is a proper object for destruction, and when it is not.

The same thing can be carried a little further. Can a vessel employed by a government to transport munitions, or to bring home persons called to the flag, take on so many passengers as to make it impossible for a war submarine, as today constructed, to place the lives of all on board in safety before sinking it? And must the submarine, unable to call vessels to its aid to take off the passengers and crew, allow the prize to proceed, immune from attack, and even from interference with the munitions, because of the impracticability of dumping any considerable part of the cargo at sea? Are the vessels of all nations to be free to engage in this belligerent service, as a commercial enterprise, and thus escape all interference from submarines?

I consider the subject of the submarine to be in as great a state of confusion as it ever has been and as open as the subject of naval disarmament, concerning which many defects in the treaty were well presented to the Society at its first meeting through the admirable paper of Admiral Knapp.

Admiral RODGERS. I might say something, sir, about the submarine with regard to the last speaker's argument. The submarine treaty adopted by the recent conference is to be the pivot in the conference on the codification of international maritime law upon which all other things are to hinge; and in view of all that was said last night in regard to its introducing a new definition of international crime, and its wholly revolutionary character in that direction, to make it the pivot of international law from now on causes some surprise. Regarding the point that was made as to loading a munitions ship with passengers in order thereby to get safe conduct, it is perfectly obvious that that might be done, but I think it would scarcely give protection under the necessities of war.

There are certain ambiguities of the treaty. It speaks of commerce destroying. There are two ways of destroying commerce. One way was practiced by England in the war. She interrupted traffic, the enemy's traffic,

with little destruction of shipping and no loss of life. Germany attempted commerce destroying by destruction of shipping and considerable loss of life, and she failed to destroy English commerce although she embarrassed it and destroyed a great deal of neutral shipping.

Then there is an idea which comes to the front with the very recent development of the last century of steam transportation. Shipping has now grown to such a great scale, and nations depend on it to such an extent, that it is as much an international public utility as railways are an internal public utility.

We have hitherto recognized capture, because it was the transfer of a utility which was private from one national ownership to another. There was no world loss. But now, in the great extension of commerce and the interrelations of nations, where the raw product may be in one country and the finished product manufactured in another, the ownership of shipping is an international public utility, and the world is not going to stand for its destruction. The submarine in itself has no inherent viciousness, and if it operates according to the laws of surface ships, whatever they may be, it should be allowed to do so just as well as any other class of ships.

The naval officers of the world are a body, and the whole profession would feel somewhat mortified to have applied to some of its members the appellation of pirates in case they should carry out the instructions of their governments. They cannot now apparently even give auxiliary aid in the interruption of commerce. That is open to question. Let us say there is a blockade, and a submarine rendering combatant service in the neighborhood of the blockade makes signal to a surface ship to come up and overhaul a capture, a merchant ship, trying to break through the blockade. Does her auxiliary service there render her liable to the pains of piracy? Or if she goes and lays mines to interrupt the combatant enemy, and a merchant ship runs on the mine, is she again liable as a pirate for interrupting commerce? The whole question is so involved that to make that the pivot of maneuver for the development of all international criminal law hereafter, seems to open up a great many difficulties.

The CHAIRMAN. If there are no other remarks to be made on the reports of these subcommittees, now comes the motion made to refer the reports of the four subcommittees to the Committee on Organization of Work, in order that the committee may consider them and have them printed and distributed. Are you ready for the question?

The question was called for; the motion was put, and unanimously carried.

Mr. CHARLES G. FENWICK. Mr. Chairman, may I have a word with regard to the general subject under discussion? It has pained me a great deal that we have felt it necessary to devote the work of four subcommittees to the topic of war. We have discussed war, war, war, war, under each subheading. It appears that the Society at its last meeting was unwilling

to discuss more constructive topics. I entered a protest, with Mr. Ralston and others, at last year's meeting against the exclusive devotion of our attention to the subject of war. Now, personally I feel that this subject is scarcely worth discussion. I know that is a very controversial question; I would prefer not to raise it; but I waded through Mr. Garner's two volumes on International Law during the World War, and I think it is pretty conclusively shown there that the subject is in a tangled condition from which there is no way of extricating ourselves. The Hague Conference tried legislation. It absolutely failed. Either the Powers would not sign the conventions, or they would not ratify them for one reason or another. The conventions relating to the laws of war failed. The Declaration of London failed. I do not believe any declarations or resolutions of that kind will be worth the paper they are written on. Either the other nations will not agree to them, or, if you do get them to agree, under stress of war, of self-preservation, they will break them. I feel that our attention should be devoted to the constructive side of international law. The most vital problem before the world today is the problem of international organization.

The international law association is meeting here in Washington with the eyes of all forward-looking people upon it, and we are offering them absolutely nothing in that respect. We discussed international organization at our meeting in 1917, and the question is more vital than ever now. We must have international legislation of some sort. An international legislative body sounds novel and strange. But the principle is not new. The Hague Conferences tried to legislate, but they legislated ineffectively. The only possibility for the development of international law is, not by the slow process of customs which will always lag fifty years behind the needs, but by some form of international statutes, such as were adopted at The Hague, but adopted in too limited a field. We must regulate commerce between the nations. That problem is a problem of international legislation. At the present moment the United States Shipping Board is entering upon a rate war with a British shipping firm, with government resources on our side and only private resources on the other. The jingo press will hurrah, and there will be another triumphant cartoon of our merchant marine on the seas. The Shipping Board will win. But what will be the result? Friction between ourselves and Great Britain, the country above all others with which it is most important that we maintain friendly relations.

Now we must face these problems of international legislation. We must attempt to establish some law between nations covering their commercial rivalries. We must attempt to regulate the competition for foreign markets and the raw materials of industry. I am not so idealistically minded as to count upon an era of free trade. I believe that until that day comes there is not much chance of international peace. But I know there is a wall of human selfishness and nationalism that we shall have to climb over before we fully solve the problem of peace and amity between nations.

But international trade rivalries can be and must be regulated. And it is for us to lay down and propose a plan of regulation.

Then we have got to have an international executive to back up the decisions. Now that again sounds novel. But you have it in germ today, if international law is law at all. Public opinion of the international community acts as an inchoative legislative body, as an inchoative executive body. But I say it is acting in a defective way; and we have to organize it, we have to try and formulate some plan of international execution of the law. I do not urge the adoption of force. I sympathize fully with Dr. Scott's position that we shall never make progress if we fall back on force. But you do not have to use force if you organize the collective opinion of the nations. There is a form of execution without physical force, whether by economic boycott or otherwise. No one will fly in the face of the collective will of the world. The problem is, how can it be organized?

Then we have to have an international judicial system. We have now a court, but without effective jurisdiction. The sole elements of compulsory jurisdiction conferred upon it were taken away when the plan proposed was adopted by the League of Nations. We must give our attention to the question of an international court, and what cases can be submitted to it, and on what basis of law.

Now those are the problems before us. Those are the definite problems the world wants to see the Society of International Law speak upon. I think we are derelict in our duty if we keep discussing the laws of war, war, war, and do not devote ourselves to the present greater question of the laws of peace, because at the first outbreak of war whatever rules and laws we may make as to war will be thrown into the discard.

Mr. JACKSON H. RALSTON. May I say just a word? I entirely sympathize with the sentiments of the speaker who has just taken his seat. I do not think the work which is now being done by the Society has that fundamental nature it should possess. We do not inquire as to what is law, but we stumble about what is practice; and there is the greatest difference in the world between the two. Let me use a little illustration which appeals to my mind, and I hope it may have some force.

The subject of contraband has been mentioned this morning, with an indication that there was a discussion on hand as to what was or was not contraband. There is an antecedent question which has got to be met and got to be determined before that is discussed at all, and it is this: Is contraband in itself a lawful, I mean a fundamentally lawful thing? Now, that discussion is entirely waived. Let us see what the operation of contraband is. A neutral nation undertakes to deal with a nation at war. The opposing warring nation seizes the property the neutral nation is trying to convey. Now by what right has either nation in conflict,—by what right does it interfere with the normal and the natural processes of trade? By what right does either nation at war establish a blockade? Unless you can find a right

justifying one nation or another in interfering with what is of itself a natural and innocent, orderly and proper thing to be done, unless you can find a justifying right, then there can be no law of conditional contraband, or any other kind of contraband.

Now I say that if this Society wants to do real things, let it go to the very foundation; let it ask itself, not whether such and such things be done, not whether, granting the right of contraband, it shall go so far, or so far, but let it get the thing right down to the root; let it find whether there is and can in righteousness be such a thing at all as contraband, and whether the existence of contraband does not violate the natural right of one nation to trade with another, and whether any law can be founded upon the violation of a natural, indisputable right. When we discuss things from that point of view, Mr. Chairman, we may discover whether there is or is not such a thing as international law in any degree affecting that question. As I say, we simply discuss not law at all, but, granting a vicious condition of affairs, whether the vice should go so far, or so far.

Now when you discuss the laws of war—you are discussing nothing on earth else,—you are discussing the laws which shall control crazy men. That is all there is to it. You show us that if you get yourself in a condition of passion, if you determine to take advantage, if you will, of another nation, you shall go so far, but you cannot go so far. Of what earthly value is it? What is the relation between a thing of that kind and the thing which, Mr. Chairman, you properly consider as law in the court over which you have the honor to preside? There is no relation at all. It is a condition of affairs not laid down by a superior, not enforceable, not founded on any substantial theory of right or wrong. You can hold up these laws of war from any point of view you desire, and you are bound to come to the conclusion that they are not laws at all. What are they? Nothing but practices; nothing but practices of the utmost absurdity. And the time will come, it is safe to say, when a more enlightened humanity will look back to just such discussions as we carry on with regard to the laws of war as one of the vanished, one of the most curious things ever happening in the history of humanity.

Now let me use a single illustration—I have talked longer than I started to. But let me use a single illustration to show what at least appears to me to be the absolute absurdity of all this question of the laws of war. You cannot kill wounded prisoners. How utterly absurd! One instant you have a right to wound a man, you have a right to kill him, and the next instant, he being wounded and you capturing him, you have no right to kill him. Perfectly absurd! There may be a practice of that kind. We may think that it is a gentler thing to do things that way, but as to there being a fundamental reason, there is no reason about it except that you are afraid that if you follow a different practice it may revert, it may fall back on you, and you may be the sufferer under like circumstances. But that does not make the laws of war; that makes a practice that under given cir-

cumstances you find it advisable to follow. And let it be called a practice. Let it be recommended as a practice. But do not let us be guilty of the absurdity of saying that those things, these various things that are spoken of, and numberless others, are laws of war. They are not.

Dr. DAVID JAYNE HILL. Mr. Chairman, I have no thought of making a speech. I want to say, however, that I am to a certain degree in sympathy personally with the remarks of the last speakers, and yet I think that some distinctions have to be made which perhaps they have overlooked. In the first place, you talk of international organization. What are you going to organize? Hostile, unwilling nations, or nations that are brought together upon some basis of rational consideration? There is no use trying to organize anarchy or riot. You have to put it down and suppress it, and then you can organize peace. Now it seems to me that the important thing is to attack anarchy, riot, disorganization, at its weakest point internationally. War has existed, may exist, probably will exist, if it is not averted. The great problem, sir, of international organization relates to war. If you can suppress the war spirit, then you can organize internationally. If you can modify, if you can regulate, if you can bring under law the motives and the acts and the purposes of war, you have accomplished something toward international organization; and until you do it, there is no hope of international organization. Therefore, I think, sir, that this Society is right in giving great attention to the laws of war, and it has a splendid opportunity to determine what, in its judgment, the laws of war ought to be.

There are belligerent rights, of course, as long as a man is exposed to attack in a dark alley which he has to traverse. There are rights of belligerency, because he has a right to defend himself; and as long as there are perverse nations in the world, which for purposes of their own wish to go to war and attack other nations, or deny or encroach upon the rights of other nations, there is a just cause of war, cause of defense, and the defender has some rights as a belligerent. There are, therefore, belligerent rights, and those rights exist wherever belligerency occurs on the sea, as elsewhere. I think that is quite indisputable, is it not? Very well, then. What we have to do now is to consider the laws, the basic principles of justice, upon which peace can be organized, and in order to do that, you have to set limits to the rights of war. You must accord the belligerent some rights, if he is attacked. You must accord neutrals their rights when the process of war is going on; and the great fundamental problem is so reasonably and justly to balance those rights of the belligerent and of the neutral as to attain to the nearest approximation to justice possible under our human conditions.

I say, then, that we are proceeding in the right direction and in the right manner of taking up the laws of war, because if we are able to approximate toward the elimination of war, or putting proper restraints upon war, we are doing that one vital and necessary thing which is the prelude of the organization of peace, and without which there can be no organization of peace.

Now I have noticed that there is some variation of opinion among the gentlemen who have formed these four subcommittees dealing with the subject of war. Here we have the question of contraband. I think there is a great deal in what Mr. Ralston said about contraband, and when you come to make it universal and destroy the distinction between absolute and conditional contraband, and make all merchandise contraband, why you expose the commerce of the world to the capture of one or the other of the two belligerents on the sea, and it is the suppression virtually of the commerce of neutrals; and it is a gross injustice, and the world will not endure it. And when we think this thing out and arrive at the formulae at which we will arrive, they cannot be of a nature to give an unlimited right of capture of neutral commerce on the sea. You have got to draw the line so as to preserve the inherent rights of the neutral for pacific trade.

Take the subject of continuous voyage; that is an American doctrine; it has been a very useful doctrine; it is a very important doctrine. But if you undertake to say that a European Power can blockade every European port theoretically, not actually, by saying that if your goods reach any port they can go to every other country through the internal railway system, and the inland waterways, and therefore if you send goods to Rotterdam, they are certainly designed for Germany, or probably designed for Germany, why you are putting an end to commerce. You have got to put a limit on that doctrine of continuous voyage. At least you have got to put it in the form that you must have absolute proof that those goods that are billed to Rotterdam are really going beyond, and not merely a supposititious case that they might go beyond.

And now I hope I shall live long enough to see the present procedure of this Society reach a culmination and an achievement, and that we shall be able, after most careful consideration, to arrive at conclusions which may not correspond to practice, which may not be a reaffirmation of the customary law of nations, but which will be shot through with pure rationality, based upon modern conditions, because these conditions have changed, and we have to adjust our laws to the actual existing conditions in the world.

Mr. Chairman, I must not take more time, but I wish to say that as our country, a great, peaceful, trading country, will probably never have an aggressive naval war, and if it has any war at all it will be one of defense, but most probably it will always be a neutral in any great naval war that may take place, we must as American citizens and American jurists primarily support that form of right which is dearest to us, namely, the rights of our own country as a neutral. The doctrine of neutrality has had a growth and development in this country that it never had in any other country of the world, and we ought to take our stand, not on the side of increasing and establishing belligerent rights on the sea, but of defending and thoroughly grounding the fundamental neutral rights on the sea, because the sea belongs to nobody; it is God's highway of communication between the nations. And

if you establish laws that interrupt and destroy commerce, why you will never have international organization. All these conflicts will leave bitterness and hatred behind them, and the less we can trade freely—I will not say with the enemy,—I will not say that, because the belligerent has his rights; but if we cannot trade freely with those who like ourselves are neutral, and if we are to be estopped from it by being told that trading with a neutral may be beneficial to an enemy, I think that we are placed in a very disadvantageous position.

I feel, gentlemen, as a citizen of my country, that we have a great task before us as Americans. We belong to the nation that of all nations of the world can exercise the most decisive influence upon international law and upon the international law of the sea. If we forfeit our heritage, if we diminish the efficiency of our navy,—for we must not forget this, that no law is worth anything unless it can be enforced, and no law can be enforced except by the physical power to enforce it;—and if we make treaties and international agreements that emasculate our power, we lose our influence in the world, and the great ideals of justice for which we stand, ideals that grow out of the political philosophy on which this nation is founded. If we permit ourselves to be emasculated, we efface our usefulness in the organization of the world.

Mr. FENWICK. I should just like to say one word. I have the highest respect for the work which the speaker who has just concluded has done in the field of international law; but I think if we study the proceedings of the two Hague Conferences and see that their record was simply one of legislating for war, and that practically all of their legislation has been discarded, and that the sole nations that live up to the dictates of humanity live up to them, not because of any statute of the Hague Conferences, but because of the inherent decency of the nation, we shall see it is futile to go further with the laws of war. Of all its thirteen conventions in 1907, eleven of those conventions related to the laws of war, and went into the discard. Now the conference spoke very piously in its Final Act of having, after six months of deliberation, conceived a very lofty ideal of international justice; but they did not organize for peace, and if war is to be prevented we must organize for peace.

Now if I believed with the last speaker that the world is in chaos and anarchy, and that the nations face each other like hungry wolves, I should think it perfectly futile to suggest studying the law of international organization; but I do not think that is true of the nations. I think the nations have a collective sense of justice. I think the common interests of the nations are bigger than their mutual differences. At present our whole attention is to stress differences. The problem of international organization is to study the basis of common interests, and it is on that basis that we must organize, and unless we organize we face other wars for the future; and I defy any gentleman here to contemplate the next world war with equanimity.

Mr. KUHN. Mr. Chairman, I think the proceedings of this meeting have been very much enlightened by the new thought which has been injected into them, and I think that we ought to receive, with great appreciation, that which has been said this morning. I think the Society ought to remember, however, that these committees are engaged in their practical work along the lines suggested by the Commission of Jurists at The Hague—I refer to the four-fold classification which they made. It is not our own classification. We simply acceded to it as a practical one for our labors, because it was made in connection with the organization of the Permament Court of International Justice of The Hague. We are not acting separate and apart from the work of world organization in dealing with these subjects, even though we seem to be. We have our noses a little bit close to the grindstone, it is true, but every working man must keep his nose to the grindstone if he wants to make progress, and the work is sometimes dreary and technical and dry, but I think progress is being made. On the other hand, I think that we can now make a further step. And in line with the suggestions made this morning, I am going to present a motion for the consideration of the Society:

> *Resolved*, That it is the sense of this meeting that the Committee for the Advancement of International Law consider whether it is not within the purview of their plans to present to this Society, at some forthcoming meeting, the consideration of the feasibility of some international organization as a means of conducting the international relations of states, in which the United States may properly coöperate.

Dr. JAMES BROWN SCOTT. Mr. Chairman, if Mr. Kuhn would be good enough to omit the last phrase, which is one of peculiar appeal to the political power of the government, I shall be very glad to second his motion.

Mr. KUHN. I shall omit it. I know the very delicate sensibilities of many men at the other end of Washington, and at this end of Washington! And I shall be very glad to omit it, as we desire to avoid any possible infringement on political questions.

The CHAIRMAN. How will it read then, Mr. Kuhn?

Mr. KUHN. Put the period at the word "states." Then, will that conform to your idea, Dr. Scott?

Dr. SCOTT. Yes, sir.

Dr. SCOTT. Mr. Chairman, I should like to make just a remark or two in support of the motion that is made; but before doing so, I should like to say that I agree thoroughly with the plan that was drafted by the jurists at The Hague in 1920, and which apparently considered that these matters relating to the laws of war were necessary to be discussed in connection even with organizing that highly sensitive and delicate tribunal known as a Court of Permanent International Justice, and therefore I am not in favor of relegating the work we have undertaken to the scrap heap.

At the same time, there are other questions, and Mr. Fenwick has called

attention to the advisability of discussing other phases of the subject. I am heartily in favor personally of discussing plans of organization, plans of association, plans of coöperation, to see to what extent we can strengthen and accelerate the coming together of the nations, plans which shall to them be found to be mutually satisfactory, and to the world at large mutually helpful. · Now there is a difference of opinion among the members, apparently, and I should think one way of making progress is not to insist, if there be a majority in favor of one view, that the will of the majority shall prevail to such a degree that the minority will not have a voice.

Bishop Hubbell used to say—it is unnecessary to remark that he was a high churchman and a Tory—that the only interest the people had in laws was to obey them. And I suppose that is the theory of the majority. In any community there must be a direction, there must be a force. We must go ahead, and we can only go ahead in some direction. But at the same time there are many, many questions worthy of consideration, and I think among the most worthy are questions of organization, the bases upon which they can rest; how can they rest upon a legal system; can they rest upon principles of law? Do questions of policy intervene to such a degree that questions which would otherwise be judicial or legal have become moral, political? The world is interested in that phase of the subject, and I take very great pleasure indeed in seconding Mr. Kuhn's motion that this matter be referred to the Committee for the Advancement of International Law, in order to have determined by them, sitting quietly around a table, not moved by passion, or by one view or by another, whether it could not be done, whether it should not be done; that in a forthcoming meeting questions of international organization should be put upon the agenda, should be discussed in the hope of seeing whether some project may not be elaborated which will meet with the approval of the members present, representing different views among the membership of the Society of International Law, and which, if published, may perhaps have an influence in drawing together leaders of thought in different countries upon some plan or some organization or coöperation which may really prove feasible and which may really prove helpful. I think a consideration of a question of that kind is nothing less than courtesy, and I am quite sure that under the chairmanship of Mr. Root, who is really, as you know, a partisan of organization, going a little further than some people think we should go, going a little less far than some people think we should go,—I think we can look forward to the careful, thoughtful consideration of such a question and such a formulation that would be made which will meet the desires of both groups, or many groups, and at least enable us to clarify our views by stating them and discussing them.

The CHAIRMAN. Are you ready for the question?

The question was called for, and the motion was duly put and carried.

The CHAIRMAN. Is there any other business to be transacted? The report of the Committee on Nominations is in order, Mr. Partridge.